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The Sporhase Case

Dennis Montgomery

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THE SPORHASE CASE

Dennis Montgomery
Assistant Attorney General, State of Colorado

New Sources of Water for Energy
Development and Growth: Interbasin Transfers

a short course sponsored by the
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June 7-10, 1982

THE SPORHASE CASE

By

DENNIS M. MONTGOMERY

ASSISTANT ATTORNEY GENERAL
Natural Resources Section
State of Colorado

NEW SOURCES OF WATER
for ENERGY DEVELOPMENT
and GROWTH:

INTERBASIN TRANSFERS

NATURAL RESOURCES LAW CENTER
UNIVERSITY OF COLORADO
SCHOOL OF LAW

JUNE 7-10, 1982

THE SPORHASE CASE:

CAN A STATE CONSTITUTIONALLY
PROHIBIT THE EXPORTATION OF
GROUNDWATER OUTSIDE THE STATE?

I. THE FACTS.

- A. Joy Sporhase and Delmer Moss are residents of Colorado. In 1972, they purchased adjacent and contiguous tracts of land in Phillips County, Colorado, and Chase County, Nebraska. On the Nebraska tract, a few feet from the state line, was an irrigation well which had been constructed by the prior owners of the property. Sporhase and Moss installed a center pivot sprinkler irrigation system on the Colorado tract and an underground pipe from the Nebraska well to the sprinkler system to irrigate the Colorado tract.
- B. Neither Sporhase and Moss nor the previous owners had applied for a permit to transport ground water from the Nebraska well for use in Colorado in compliance with a Nebraska statute. Upon receipt of a complaint, the Nebraska Department of Water Resources advised

Sporhase and Moss in 1976 that they were transporting ground water outside Nebraska in violation of Nebraska law.

- C. In 1977, the Nebraska Attorney General initiated an action against Sporhase and Moss to enjoin them from transporting ground water from the Nebraska well for use in Colorado.
- D. On May 8, 1981, the Nebraska Supreme Court rejected Sporhase and Moss's argument that Neb. Rev. Stat. § 46-613.01 (Reissue 1978) was unconstitutional. The case is presently on appeal to the United States Supreme Court.

II. THE STATUTES.

A. The Nebraska Statute:

46-613.01. Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the

water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.

B. The Colorado Statute:

37-90-136. For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all ground waters of this state, whether tributary or nontributary to a natural stream, which waters are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person to divert, carry or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, as said waters are in this section defined, into any other state for use therein.

III. THE NEBRASKA SUPREME COURT DECISION.

- A. State ex. rel. Douglas v. Sporhase, 208 Neb. 703, 305 N.W. 2d 614 (1981) (Appendix A), prob. juris. noted, Sporhase v. Nebraska,

No. 81-613, 102 S. Ct. 631 (Nov. 30, 1981),
argued March 30, 1982.

IV. ISSUES BEFORE THE UNITED STATES SUPREME COURT.

1. Whether Neb. Rev. Stat.
§ 46-613.01 (Reissue 1978),
which requires a permit for
the exportation of water
from the state and using the
consideration of reciprocity
of the receiving state's laws,
violates the Commerce Clause,
Article I, Section 8 of the
United States Constitution?

2. Whether the Congress has
exempted the regulation of
water from the application
of the Commerce Clause of
Article I, Section 8 of the
United States Constitution
and left this power to the
states?

3. Whether Neb. Rev. Stat.
§ 46-613.01 (Reissue 1978)
requiring a permit to export
water conditioned upon reci-
procity in the receiving
state violates the Equal
Protection or Due Process
Clauses of the Fourteenth
Amendment of the United
States Constitution?

V. THREE DECISIONS; THREE APPROACHES TO COMMERCE
CLAUSE CHALLENGES.

A. Hudson County Water Co. v. McCarter, 209 U.S.

349 (1908) (Appendix B). A New Jersey statute prohibiting the transport of surface waters for use in another state upheld against a challenge under the commerce clause on the grounds, inter alia, that "(a) man may not acquire a right to property by his desire to use it in commerce among the states."

- B. Weiland v. Pioneer Irrigation Company, 259 U.S. 498 (1922) (Appendix C). An irrigation company diverting water from the North Fork of the Republican River in Colorado which was sold for agricultural use on lands in Colorado and Nebraska brought suit against the Colorado State Engineer for not enforcing its priority against junior appropriators in Colorado. The irrigation company alleged that its federal right to engage in commerce between the states by transporting water from Colorado and selling it in Nebraska was being impaired by Colorado officials. Held, the issue was governed by the doctrine of equitable apportionment of interstate waters. The Pioneer decree was later incorporated into the Republican River Compact. Art. V, 57 Stat. 86 (1943) (Appendix D).

C. City of Altus, Oklahoma v. Carr, 255 F. Supp. 828 (W.D. Tex.), aff'd per curiam, 385 U.S. 35 (1966) (Appendix E). A Texas statute prohibiting transport of ground water outside the state without legislative authorization declared unconstitutional as an unreasonable burden on interstate commerce. Hudson County Water Co. v. McCarter distinguished on the grounds that under the law of the State of Texas, ground water once reduced to possession is personal property subject to sale and, therefore, is an article of commerce.

VI. IS GROUND WATER IN NEBRASKA AN ARTICLE OF COMMERCE?

A. Much attention was devoted in the briefs filed with the United States Supreme Court to the question of whether ground water in Nebraska is an "article of commerce". Nebraska follows a variant of the American doctrine of "reasonable use" of ground water. According to the Nebraska Attorney General, ground water used for agricultural purposes can be used only on overlying lands, and is

therefore not an "article of commerce". But consider the following exchange between the Supreme Court and counsel for Sporhase and Moss:

QUESTION: Now, tell me again. Under Nebraska law, can -- are water rights transferable between private parties?

MR. DUDDEN: Yes, they are, Your Honor.

QUESTION: For money?

MR. DUDDEN: For money.

QUESTION: And are they -- are they -- can they be separated from the land?

MR. DUDDEN: Yes, I believe they could be. However, in most instances, Your Honor, the transfer of water for money is involved in the price of the land.

* * *

QUESTION: What if I in Nebraska -- what if your client wanted to -- wanted to sell his water right to an adjoining landowner?

MR. DUDDEN: He could do that, Your Honor, but the water registration specifically

provides for the water to be used on agricultural land. They call it overlying agricultural land.

QUESTION: All right. But you can transfer it to another piece of agricultural land?

MR. DUDDEN: Yes, he could.

QUESTION: And in that sense -- and he could be paid for it?

MR. DUDDEN: Yes, in Nebraska.

QUESTION: In Nebraska. Now, in that sense it's an article of commerce.

MR. DUDDEN: Absolutely, absolutely.

QUESTION: But he cannot -- he could not under this law, I take it, sell that water right to somebody in Colorado?

MR. DUDDEN: That is correct, Your Honor.

QUESTION: Suppose it's very good water that your client has on his land. Could he bottle it and sell it over in Omaha and Lincoln?

Mr. DUDDEN: Nebraska has -- the Nebraska Supreme Court has approved the commercial sale of water for drinking purposes. . .

QUESTION: Well, that gives some hint that it's an article of commerce, doesn't it?

MR. DUDDEN: I felt that it did, Your Honor, yes. That's our position.

- B. Assuming ground water in Nebraska is an article of commerce, does the State of Nebraska have any claim on the basis of sovereignty to prevent the export of ground water for use outside the state?
- C. Would the answer be different, if the ground water had been equitably apportioned between Colorado and Nebraska and Sporhase and Moss were exporting ground water which had been apportioned to Nebraska?
- D. Does the Nebraska anti-export statute serve any legitimate state interest in conserving ground water within the state?

- E. If congress has exempted state regulation of water from the commerce clause, should City of Altus, Oklahoma v. Carr be overruled?
- F. Does the reciprocity requirement in the Nebraska statute serve any legitimate state interest in conserving ground water by promoting complementary ground water policies in adjoining states. Compare Great Atlantic & Pacific Tea Co., Inc. v. Cottrell, 424 U.S. 366 (1976), with Western and Southern Life Ins. Co. v. Bd. of Equalization, _____ U.S. _____, 101 S. Ct. 2070 (1981).

FURTHER READING

Hellerstein, Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources, 1979, Sup. Ct. Rev. 51.

Ladd, Federal and Interstate Conflicts in Montana Water Law: Support for a State Water Plan, 42 Mont. L. Rev. 267 (1981).

Schenkkan & Anson, Federalism, the Dormant Commerce Clause, and State-Owned Resources, 59 Texas L. Rev. 71 (1980).

White, Reasonable State Regulation of the Interstate Transfer of Percolating Water, 2 Nat. Resources Law 383 (1969).

Comment, Do State Water Anti-Exportation Statutes Violate the Commerce Clause? Or Will New Mexico's Embargo Law Hold, Nat. Resources J. 617 (1981).

Comment, "It's Our Water". -- Can Wyoming Constitutionally Prohibit the Exportation of State Waters?, 10 Land & Water L. Rev. 119 (1975).

Note, Interstate Transfer of Water -- The Western Challenge to the Commerce Clause, 59 Texas L. Rev. ____ (1981). (forthcoming).

Clyde & Clyde, State Prohibitions on the Interstate Exportation of Scarce Water Resources, Water Resources Allocation.

Laws and Emerging Issues (1981 Conference, University of Colorado School of Law).

Wahoo, 124 Neb. 802, 248 N.W. 304 (1933). The *Olson* court specifically rejected the "English rule" of rights in ground water, which recognizes absolute ownership of ground water in the overlying landowner. Instead, the court adopted a slightly modified version of the more restrictive American rule of "reasonable use"; "The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning." *Id.* at 811, 248 N.W. at 308. The "pure" American rule, as stated by other authorities at the time, did not include the concept of sharing in times of shortage, and the *Olson* court's inclusion of that concept demonstrates its view that water is a unique commodity subject to state regulation to assure that it is available to everyone in the state in relation to their need, rather than their ability to pay for it.

The Nebraska Constitution declares water for irrigation purposes in the State of Nebraska to be a natural want. Neb.Const. Art. XV, § 4. The decades of the 1930's and 1940's saw a quantum expansion in Nebraska of the use of ground water for irrigation. See Aiken, *Nebraska Ground Water Law and Administration*, 59 Neb.L. Rev. 917 (1980). Legislative recognition of the state's power and the corresponding need to manage the state's ground water resources began in 1957 when the Legislature declared "that the conservation of ground water and the beneficial use thereof are essential to the future well-being of this state." Neb.Rev.Stat. § 46-601 (Reissue 1978), and enacted statutes requiring well registration, well-spacing, and filling of abandoned wells. Neb.Rev.Stat. §§ 46-602 and 46-609 (Reissue 1978).

Transfer of ground water was considered by the Legislature in 1963. Neb.Rev.Stat. §§ 46-638 through 46-650 (Reissue 1978), enacted that year, and § 46-654, enacted in 1965, granted only to cities, villages, and municipal corporations the right to transport ground water out of its basin of origin for the purpose of supplying urban water needs. Since the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users.

Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 799-800, 140 N.W.2d 626, 636 (1966), confirmed that "[u]nderground waters, whether they be percolating waters or underground streams, are a part of the waters referred to in the Constitution as a natural want. . . . [I]t is becoming more important and extremely necessary that regulation and control of all sources of water supply be attained." That court held that it is "the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use." *Id.* at 801, 140 N.W.2d at 637. The opinion clearly held that the Legislature has the power to determine public policy with regard to ground water and that it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.

Only a year after the decision in the *Metropolitan* case, the Legislature enacted the statute at issue in this case, § 46-613.01, dealing with transfer of Nebraska ground water across state lines. The statute allows such transfers conditioned on the receipt of a permit from the director of the Department of Water Resources, who may grant the permit if the transfer "is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare," and if the receiving state "grants reciprocal rights" providing for transfer of ground water from that state into Nebraska.

[3] The parties concede that Colorado forbids the transfer of ground water outside its borders and has no reciprocity provision in its statute. Neither the courts nor the Legislature of Nebraska have considered Nebraska ground water as an article of commerce. Free transfer and exchange of ground water in a market setting have never been permitted in this state, since the water itself is publicly owned. The public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purpose; but as the *Olson* opinion demonstrates, with its emphasis on sharing in times of shortage, the public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake. Even where it appears that water itself is being marketed, as in municipal water supply arrangements, it is the value of the cost of distributing the water that is the basis of the rate structure and not the value of the water itself. See *K. S. B. Tech. Sales v. North Jersey Dist. Water Supply*, 75 N.J. 272, 381 A.2d 774 (1977).

Appellants in their brief place great reliance on the case of *City of Altus, Oklahoma v. Carr*, 255 F.Supp. 828 (W.D.Tex.1966), *aff'd per curiam* 385 U.S. 35, 87 S.Ct. 240, 17 L.Ed.2d 34 (1966), which held that a Texas statute forbidding interstate transfers of water without legislative permission placed an unconstitutional burden on interstate commerce. However, at the time of *Altus*, Texas law treated ground water much differently than Nebraska. Texas recognized the absolute ownership of subterranean water in the overlying landowner. This is in sharp contrast to the narrowly circumscribed right of reasonable use only on the overlying land recognized in Nebraska. In addition, the *Altus* court noted that, in Texas, "after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off of the land and outside the basin where produced, just as he could sell any other species of property." *Id.* 255 F.Supp. at 840. In sum, said the *Altus* court, "the general law of the State of

Texas . . . recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce . . ." *Id.* at 840. Since the only transfers prohibited by Texas law were interstate transfers, *Altus* found that Texas considered ground water to be an article of commerce, subject to the commands of the commerce clause of the U.S. Constitution. However, intrastate transfers of ground water in Nebraska are permitted only under carefully prescribed conditions and do not resemble a free-market setting. Ground water use is not an unlimited private property right in Nebraska law. The decision in *Altus* is not controlling. Nebraska ground water is not an article of commerce and thus not subject to the strictures of the commerce clause.

Since the *Altus* case was affirmed without opinion by the U.S. Supreme Court, we must assume that the high court had no quarrel with the District Court's application of the law to the particular facts of *Altus*. However, we need not and do not assume, as appellants would have us do, that *Altus* "overruled *sub silentio*" the 70-year-old holding in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908), that a state may, under its police power, forbid or condition the interstate transfer of its water resources without running afoul of the commerce clause. The *Hudson* case upheld the constitutionality of a New Jersey statute prohibiting the transfer of New Jersey surface water out of the state. The court noted that "[a] man cannot acquire a right to property by his desire to use it in commerce among the States," and emphasized that the state as "quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.* at 355-57, 28 S.Ct. at 531-32.

[4] There have been other U.S. Supreme Court cases limiting the rights of individual states to put conditions on the interstate transfer of natural resources other than water, such as natural gas and minnows. *Penna. v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923); *Oklahoma v. Kansas Nat. Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716 (1911); *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). However, we note that the natural resources dealt with in those cases have historically been market items, reducible to private possession and freely exchangeable for value. This has never been the case with underground water in Nebraska. Further, since water is the only natural resource absolutely essential to human survival, the application of rules designed to facilitate commerce in less essential resources to the transfer of water must be done, if at all, with extreme caution. It is this caution which prevents us from holding that Nebraska ground water is an article of commerce. Because the ground water in this case is not an article of commerce, the commerce clause considerations do not apply to the Nebraska statute at issue here.

[5] Appellants also urge that § 46-613.01 violates the due process provisions of the fifth and fourteenth amendments to the Constitution of the United States, which prohibit the United States or an individual state from depriving an individual of life, liberty, or property without due process of law. Although the arguments in the "due process" section of appellants' brief are actually equal protection arguments, we note that conditioning a landowner's right to transfer ground water either within or without Nebraska does not deprive him of a property right, since, under Nebraska common law, ground water may not be transferred off the overlying Nebraska land at all unless the public, owners of the water, grant that right. Not being at liberty to transport ground water without public consent and having no private property right in the water itself, appellants are deprived of neither liberty nor property by § 46-613.01.

[6, 7] Nor does the reciprocity provision of § 46-613.01 violate constitutional guarantees of due process, as appellants claim, by delegating legislative authority to the legislature of another state. The Nebraska Legislature has exercised its legislative authority by determining the public policy of the state with regard to ground water and enacting that determination into law. It has not delegated to any other state's legislature the right to determine Nebraska public policy. The reciprocity provision is merely one of several conditions to be satisfied before a permit to transport water out of state may be granted. As stated in *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 590, 290 N.W. 451, 457 (1940): "The providing of such contingencies upon which the law might properly be limited to take effect does not constitute a delegation of legislative power. The applicable rule is: The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend."

[8] In *State v. Padley*, 195 Neb. 358, 237 N.W.2d 883 (1976), the statute at issue set a 55-mile-per-hour speed limit on the portion of Interstate 80 crossing Nebraska, but declared that when the President terminates the Emergency Highway Energy Conservation Act such speed limit will revert to 75 miles per hour. The *Padley* court held that: "In so doing the Legislature has not delegated its power to make the law but has designed its alternative provision to become effective on the happening of a certain contingency." *Id.* at 360, 237 N.W.2d at 885. That court also stated that the rule set out in *Lennox* "is a well-recognized rule of law." *Id.* at 360, 237 N.W.2d at 885. The granting of a permit to transport water for irrigation out of state is contingent upon, among other things, the receiving state granting its landowners the same right. Each state is free to determine its own public policy with regard to ground water transfers and to condition the right to

transfer on one or more contingencies. Thus, there has been no unconstitutional delegation of legislative power by the Nebraska Legislature.

[9] Appellants finally argue that § 46-613.01 violates the equal protection clause of the fourteenth amendment to the U.S. Constitution by virtue of an unreasonable classification. The class upon which § 46-613.01 operates consists of those persons wishing to transport Nebraska ground water out of state for irrigation purposes. It is plain from the language of the statute that the classification is reasonable. It is related to a legitimate state interest in preserving, for the beneficial use of its citizens, Nebraska's underground water supply, and it operates equally on all members of the class. Any person wishing to transport ground water out of state for irrigation purposes must apply for a permit to do so and the director of the Nebraska Department of Water Resources is to use the same guidelines in every instance in determining whether or not the permit may issue. That the statute does not apply to irrigators who do not wish to transport ground water out of state hardly makes it violative of equal protection.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, Chief Justice, concurring in part, and in part dissenting.

While I generally concur with the majority's conclusion that establishing legislative criteria to control the transfer of water from the State of Nebraska to an adjoining state is not a violation of the commerce clause of the U.S. Constitution, I must respectfully dissent from that portion of the majority's opinion which holds that the statutory prohibition against the issuance of the permit, if the adjoining state does not grant reciprocity, is a constitutionally valid act of the Legislature. I believe that that portion of Neb.Rev.Stat. § 46-613.01 (Reissue 1978) which prohibits the Director of Water Resources from issuing a permit solely on the basis that the adjoining state

does not grant reciprocity is an unreasonable classification and violates both the Constitution of the United States and the Constitution of the State of Nebraska.

Were the statute in question to provide that no person, firm, city, village, municipal corporation, or any other entity, including a citizen of the State of Nebraska, could use water from this state on land owned by such entity in both this state and an adjoining state unless and until the Director of Water Resources found that the water request was reasonable, was not contrary to the conservation and use of ground water, and was not otherwise detrimental to the public welfare, I would have no difficulty with the statute. But the statute as it currently exists provides that even though the director might find that the request is reasonable and that to deny it would be unreasonable, that the request is not contrary to the conservation and use of ground water in this state and, to the contrary, is in furtherance of the conservation and use of ground water in this state, and that it is not otherwise detrimental to the public welfare, but in fact is beneficial to the public welfare, he, nevertheless, cannot issue such permit, solely on the basis that the adjoining state does not permit entities, including its own citizens, to transport water into this state.

The issue here is not whether reciprocal legislation is constitutional, but whether a citizen of the State of Nebraska can be prohibited from using water on land owned by that citizen in both this state and in an adjoining state solely on the basis that the adjoining state would not reciprocate. If one were to extend this statute to its logical conclusion, one could find that even though there was an abundance of water in an area in Nebraska, so much so that flooding was imminent, the water could not be transferred to adjoining land because the adjoining state refused to grant reciprocity. It occurs to me that what this statute attempts to do is to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control.

APPENDIX A

616 Neb. 305 NORTH WESTERN REPORTER, 2d SERIES

208 Neb. 703

STATE of Nebraska ex rel. Paul L.
DOUGLAS, Attorney
General, Appellee,

v.

Joy SPORHASE et al., Appellants.

No. 43206.

Supreme Court of Nebraska.

May 8, 1981.

State brought suit to enjoin defendants from transporting Nebraska ground water into Colorado without a permit. The District Court, Chase County, Jack H. Hendrix, J., issued an injunction and the defendants appealed. The Supreme Court, White, J., held that: (1) commerce clause of United States Constitution was not violated by Nebraska statute conditioning transfer of Nebraska ground water across state line on receipt of permit from director of Department of Water Resources who may grant permit if transfer is reasonable, is not contrary to conservation and use of ground water and is not otherwise detrimental to public welfare, and if receiving state grants reciprocal rights, and (2) statutory provision conditioning transfer of Nebraska ground water across state line on receiving state's granting reciprocal rights does not violate constitutional guarantees of due process on theory that it delegates legislative authority to legislature of another state.

Affirmed.

Krivosha, C. J., concurred in part and dissented in part and filed opinion.

Peter E. Schoon, Jr. and George M. Zeilinger of Padley & Dudden, P. C., Ogallala, for appellants.

Steven C. Smith, Sp. Asst. Atty. Gen., of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, Gering, for appellee.

Heard before KRIVOSHA, C. J., and BOSLAUGH, McCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

WHITE, Justice.

Appellants own adjacent tracts of land in Chase County, Nebraska, and in Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for the purpose of irrigating crops on both the Nebraska tract and the Colorado tract. Defendants' predecessor in title registered the well with the State of Nebraska on January 18, 1971, as required by Neb. Rev.Stat. § 46-602 (Reissue 1978). However, neither the defendants nor their predecessor in title applied to the Nebraska Department of Water Resources for a permit to transport ground water from the Nebraska well across the border into Colorado as required by Neb.Rev.Stat. § 46-613.01 (Reissue 1978).

The State of Nebraska brought this action in the District Court of Chase County to enjoin defendants from transporting Nebraska ground water into Colorado without a permit. After trial on the merits, the District Court issued the injunction, holding that § 46-613.01 does not violate the commerce clause of U.S.Const. Art. I, § 8, since under Nebraska law water is not an article of commerce. The District Court also held that even if ground water is an article of commerce, the statute does not impose an unreasonable burden of interstate commerce. We affirm.

[1,2] We start our analysis with the assumption that if the commerce clause is to apply to a state statute regulating the interstate transfer of a commodity, that commodity must be an "article of commerce." The term "commerce" implies that the commodity must be capable of being reduced to private possession and then exchanged for goods or services of the same or similar economic value. An analysis of Nebraska case law and statutes demonstrates that Nebraska law has never considered ground water to be a market item freely transferable for value among private parties, and therefore not an article of commerce.

The first Nebraska case to consider the overlying landowner's proprietary interest in water under his land is *Olson v. City of*

APPENDIX B

HUDSON COUNTY WATER COMPANY,
Plff. in Err.,

v.

ROBERT H. McCARTER, Attorney Gen-
eral of the State of New Jersey.

**Waters — riparian rights — diverting
water beyond state.**

1. No agreement of private riparian own-
ers can sanction the diversion of an im-
portant stream outside the boundaries of
the state in which it flows.

**Constitutional law — police power —
prohibiting diverting water beyond
state.**

2. The police power of the state justifies
the enactment of N. J. Laws 1905, chap.
238, under which a riparian owner may be
prevented from diverting the waters of a
stream of such state into any other state,
for use therein.

**Constitutional law — due process of law
— equal protection of the laws — pro-
hibiting diverting water beyond
state.**

3. Neither due process of law nor the
equal protection of the laws is denied by
N. J. Laws 1905, chap. 238, under which
a riparian owner may be prevented from
diverting the waters of a stream of the
state into any other state, for use therein.

**Constitutional law — impairing con-
tract obligations.**

4. The obligations of a contract to divert
the waters of the Passaic river into an-
other state, for use therein, are not uncon-
stitutionally impaired by the enactment,
in the exercise of the police power, of N.
J. Laws 1905, chap. 238, under which such
a diversion of water beyond the state is
forbidden.

for a period of more than twenty-five years.⁷

In November, 1964, the City of Altus entered into a contract with the Mocks whereby the City of Altus was granted an option for a period of nine months within which to purchase a lease for producing water from subsurface water-bearing formations underlying the Mocks' land. Then, in December, 1964, the citizens of the City of Altus voted to issue \$2,000,000.00 in city bonds to pay for the cost of financing the leasing, drilling and transportation of the water produced from the Mocks' land. The bonds were issued in May, 1965, and in the same month the City of Altus and the Mocks executed a lease whereby the Mocks granted, demised, leased and let unto the City of Altus the Mocks' land for the sole and only purpose of mining and operating for subsurface water and for the transportation of such water to the City of Altus for its use. Pursuant to this lease, the City of Altus has to date incurred expenses totaling approximately \$110,720.09 in connection with the investigating and leasing of the subsurface water formation underlying the Mocks' land.

On January 26, 1965, however, Article 7477b was introduced in the House of Representatives of the State of Texas as House Bill No. 225 by W. S. Heatly. Representative Heatly represents District No. 82, which includes Wilbarger County, Texas. The Texas Legislature passed Article 7477b on May 28, 1965, and adjourned on May 31, 1965. Unless called into special session, the Texas Legislature will not reconvene until 1967. . . .

Cite as 255 F.Supp. 828 (1966)

interstate commerce. *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949); *The Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511 (1913). In the recent case of *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960), an undue or unreasonable burden was defined as one which materially affects interstate commerce where uniformity of regulation is necessary.

The Plaintiffs contend that Section 2 of Article 7477b constitutes an unreasonable burden upon interstate commerce for the reason that it permits the withdrawal and use of underground water subject to the one and only condition that such water shall not be transported to another state. In support thereof, the Plaintiffs rely upon the cases of *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 43 S.Ct. 658 (1923) and *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716 (1910).

In the case of *Commonwealth of Pennsylvania v. State of West Virginia* the Supreme Court had before it the question whether a State wherein natural gas is produced and is a recognized subject of commercial dealings may enact a statute which requires that the consumers of such State shall be accorded a preferred right of purchase over consumers in other States. In holding the statute in question an interference with interstate commerce, the Supreme Court stated:

"The question is an important one; for what one state may do others may, and there are 10 states from which nat-

(7th Cir. 1937): "It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued." Accord: *Luckenbach S. S. Co. v. United States*, 312 F.2d 545 (2d Cir. 1963); *Muskegon Piston Ring Co. v. Olsen*, 307 F.2d 85 (6th Cir. 1962), cert. denied 371 U.S. 952, 83 S.Ct. 505, 9 L. Ed.2d 500; *Shell Oil Co. v. Fruserta*, 290 F.2d 689 (9th Cir. 1961).

Commerce Clause

[15,16] By virtue of the Commerce Clause, the Congress of these United States was specifically granted the power to regulate commerce among the several states, and the states may not unreasonably burden or interfere with interstate commerce. This is not to say that a state may not, in the absence of conflicting legislation by Congress, make laws governing matters of local concern which may in some measure affect interstate commerce, or even, to some extent, regulate it. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761, 767, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). Rather, it means that a state may not enact a law which imposes a direct burden on interstate commerce or discriminates against

11. Stipulation of Facts, section 6, at 5.
12. *Id.* at 5-6.
13. Report on Water Supply, March 1964, Plaintiffs' Exhibit No. 2, Table 7, shows that the total estimated cost, including interest on the debt, to be \$3,524,000 over a twenty-five year amortization period.
14. The purpose of the Declaratory Judgment Act, Title 28, U.S.C., § 2201, was succinctly stated in *E. Edlmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 854

Commerce — state interference — prohibiting diverting water beyond state.

5. Commerce between the states of New York and New Jersey is not unlawfully interfered with by N. J. Laws 1905, chap. 238, under which a riparian owner may be forbidden to divert the waters of the Passaic river beyond the state, under a contract to furnish a water supply for the city of New York.

Constitutional law — privileges and immunities — forbidding diverting water beyond state.

6. Privileges of citizens of New Jersey are not denied to the citizens of other states by N. J. Laws 1905, chap. 238, under which a riparian owner may be prevented from diverting the waters of a stream of that state into any other state, for use therein.

[No. 184.]

Argued March 18, 19, 1908. Decided April 6, 1908.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a decree which affirmed a decree of the Court of Chancery of that state, enjoining the diversion of the water of the Passaic river under a contract to furnish a water supply for the city of New York. Affirmed.

See same case below. 70 N. J. Eq. 695, 65 Atl. 489.

The facts are stated in the opinion.

Messrs. Gilbert Collins and Richard V. Lindahury for plaintiff in error.

Mr. Robert H. McCarter for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an information alleging that the defendant (the plaintiff in error), under a contract with the city of Bayonne, in New Jersey, has laid mains in that city for the purpose of carrying water to Staten island, in the state of New York. By other contracts it is to get the water from the Passaic river, at Little Falls, where the East Jersey Water Company has a large plant by which the water is withdrawn. On May 11, 1905, the state of New Jersey, reciting the need of preserving the fresh water of the state for the health and prosperity of the citizens, enacted that "it shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh water lake, pond, brook, creek, river, or stream of this state into any other state, for use therein." By a second section a proceeding like the present was authorized, in order to enforce the act. Laws of 1905,

chap. 238, p. 461. After the passage of this statute the defendant made a contract with the city of New York to furnish a supply of water adequate for the borough of Richmond, and of not less than 2,000,000 gallons a day. Thereupon this information was brought, praying that, pursuant to the above act and otherwise, the defendant might be enjoined from carrying the waters of the Passaic river out of the state. There are allegations as to the amount of water and the probable future demand, upon which the parties are not wholly agreed, but the essential facts are not denied. The defendant sets up that the statute, if applicable to it, is contrary to the Constitution of the United States, that it impairs the obligation of contracts, takes property without due process of law, interferes with commerce between New Jersey and New York, denies the privileges of citizens of New Jersey to citizens of other states, and denies to them the equal protection of the laws. An injunction was issued by the chancellor (70 N. J. Eq. 525, 61 Atl. 710), the decree was affirmed by the court of errors and appeals (70 N. J. Eq. 695, 65 Atl. 489), and the case then was brought here.

The courts below assumed or decided, and we shall assume, that the defendant represents the rights of a riparian proprietor; and, on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the court of errors and appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the state. It reinforced the state's rights by the state's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the state was warranted in prohibiting the acquisition of the title to water on a larger scale.

We will not say that the considerations that we have stated do not warrant the conclusion reached; and we shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in error that it is open to revision when constitutional rights are set up. Neither shall we consider whether such a statute as the one before us might not be upheld, even if the lower riparian proprietors

collectively were the absolute owners of the stream, on the ground that it authorized a suit by the state in their interest, where it does not appear that they all have released their rights. See *Kansas v. Colorado*, 185 U. S. 125, 142, 46 L. ed. 838, 844, 22 Sup. Ct. Rep. 552. But we prefer to put the authority, which cannot be denied to the state, upon a broader ground than that which was emphasized below, since, in our opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. *Kansas v. Colorado*, 185 U. S. 125, 141, 142, 46 L. ed. 838, 844, 845, 22 Sup. Ct. Rep. 552, s. c. 206 U. S. 46, 99, 51 L. ed. 950, 975, 27 Sup. Ct. Rep. 655; *Georgia v. Tennessee Copper Co.* 206 U. S. 230, 235, 51 L. ed. 1038, 1044, 27 Sup. Ct. Rep. 618. What it may protect by suit in this court from interference in the name of property outside of the state's jurisdiction, one would think that it could protect by statute from interference in the same name within. On this principle of public interest and the police power, and not

merely as the inheritor of a royal prerogative, the state may make laws for the preservation of game, which seems a stronger case. *Greer v. Connecticut*, 161 U. S. 519, 534, 40 L. ed. 793, 798, 16 Sup. Ct. Rep. 600.

The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that, apart from statute, those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights, that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. The private right to appropriate is subject not only to the rights of lower owners, but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an æsthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

The defense under the 14th Amendment is disposed of by what we have said. That under article 1, § 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The con-

tract will carry with it the infirmity of the subject-matter. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 438, 47 L. ed. 867, 892, 23 Sup. Ct. Rep. 531; *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127. But the contract, the execution of which is sought to be prevented here, was illegal when it was made.

The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600. and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See *Ashe v. Kansas* (200 U. S. 251, 52 L. ed. —, 26 Sup. Ct. Rep. 485). The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the state within which the river flows, even if they are made to coincide with the state line. Within the boundary, citizens of New York are as free to purchase as citizens of New Jersey. But this question does not concern the defendant, which is a New Jersey corporation. There is nothing else that needs mention. We are of opinion that the decision of the Court of Errors and Appeals was right.

Decree affirmed.

Mr. Justice McKenna dissents.

APPENDIX C

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42 SUPREME COURT REPORTER

(Oct. Term.

of the United States, the Supreme Court has jurisdiction of an appeal from the decree, under Judicial Code, § 128 (Comp. St. § 1120), though the Circuit Court of Appeals did not base its decree on the constitutional right claimed, unless the claim was so unsubstantial as to be frivolous.

2. Courts \hookrightarrow 382(5)—Decision of right to use of interstate stream held based on constitutional grounds.

Where the defendant in a suit to restrain a state engineer from depriving plaintiff of its right to take waters diverted within the state across the state boundary, claimed the right to prevent such taking on the ground the right to the water within the state was vested in the people of the state under the state Constitution, which claim was denied by the lower courts, the decision was not based on the laws of either state, but on rights in the interstate stream secured by the Constitution of the United States, so that an appeal lies to the Supreme Court under Judicial Code, § 128 (Comp. St. § 1120).

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Pioneer Irrigation Company against Adelbert A. Weiland, as State Engineer of the State of Colorado, and others. Decree for the plaintiff was affirmed by the Circuit Court of Appeals (151 C. C. A. 455, 238 Fed. 519), and defendants appeal. Motion to dismiss the appeal denied, and decree affirmed.

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*Messrs. Delph E. Carpenter, of Greeley, Colo., and Victor E. Keyes, Fred Farrar, and Leslie E. Hubbard, all of Denver, Colo., for appellants.

Mr. Edwin H. Park, of Denver, Colo., for appellee.

Mr. Justice CLARKE delivered the opinion of the Court.

The appellants, defendants below, are citizens and officers of the state of Colorado, charged with official duties with respect to the distribution of water from streams of that state for irrigating purposes, and other citizens of Colorado, who need not be further noticed.

The appellee, plaintiff below, a corporation organized under Nebraska laws, is the owner of an irrigating canal by which it has diverted water from the North fork of the Republican river, an interstate stream, at a point about 6 miles west of the east line of Colorado. Since 1890 one-third of the water thus obtained has been sold and used on lands in Colorado, and the remaining two-thirds carried by the canal into Nebraska has been used on lands in that state.

This suit was commenced in 1913, in the District Court of the United States for the District of Colorado. The bill of complaint is not printed in full in the record, but the outcome of it shows that, in addition to diversity of citizenship as a basis of jurisdiction

(259 U. S. 495)

WEILAND, State Engineer of Colorado, et al.
v. PIONEER IRR. CO.

(Re argued January 10, 11, 1922. Decided
June 5, 1922.)

No. 3.

1. Courts \hookrightarrow 382(5)—Federal question in bill gives jurisdiction on appeal, unless it is frivolous.

Where the bill sufficiently sets up a question arising under the Constitution and laws

\hookrightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tion. It was averred that the right of appellee, under the Constitution of the United States, to engage in commerce between the states of Colorado and Nebraska, by transporting water from the former into the latter and there selling it for agricultural and domestic purposes, was being seriously impaired by the unconstitutional conduct of the state of-

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ficials of Colorado, "in permitting, under color of the laws of that state, the wasteful use of the water by appropriators prior in right, and the use by others subsequent in right, to a valid appropriation by the appellee. There was also a general allegation that rights of appellee secured to it by the Constitution and laws of the United States had been invaded by the action of the appellant officials. A decree permanently enjoining this alleged unconstitutional action by the state officers was prayed for.

In its decree the District Court found that there existed the requisite diversity of citizenship to give the court jurisdiction, and also that the "suit was brought to obtain redress for the deprivation by defendants [appellants] of rights and privileges secured to the plaintiff [appellee] by the Constitution and laws of the United States," and that therefore it was a suit arising under the laws of the United States. The court found that the carrying capacity of appellee's ditch at the Nebraska state line was 29 cubic feet of water per second, that since the date of the construction of the ditch in 1890 that amount of water had been put to beneficial use in the irrigation of lands within the state of Nebraska, and that by reason of such continued beneficial use there had become vested in the appellee a property right to the continued use thereof. The Colorado officials, and their successors in office were enjoined "from interfering with the right of plaintiff [appellee] to said water as herein adjudged and . . . from treating plaintiff in the distribution of water . . . otherwise than it would be treated if said canal were wholly within the state of Colorado and all lands irrigated therefrom were in said state."

The court declined to consider the question of the wasteful or other use of the water by other appropriators in Colorado, and, confining its decree to the one point dealt with in the injunction, expressly left open for con-

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sideration and determination in another proceeding all other issues joined under the pleadings.

The Circuit Court of Appeals affirmed the decree of the District Court, and on the contention that a constitutional question is involved the case is brought here for review.

The appellee filed a motion in this court to dismiss or affirm, which was passed to hearing on the merits.

[1] In support of the motion to dismiss it is argued that, although jurisdiction was invoked in the bill on sufficiently alleged federal grounds, in addition to diversity of citi-

zenship, nevertheless both the District Court and the Circuit Court of Appeals sustained appellee's use and disposition of the water in Nebraska as one merely of prescriptive right, derived from 20 years of undisputed use, and not upon any federal constitutional ground, and that therefore the jurisdiction exercised rested wholly upon diversity of citizenship, and an appeal does not lie from the decision of the Circuit Court of Appeals under section 125 of the Judicial Code (Comp. St. § 1120).

The ground of federal jurisdiction, other than diversity of citizenship, being sufficiently set up in the bill, such a motion to dismiss can prevail only if the claim is so unsubstantial as to be frivolous. *Shulthis v. McDougal*, 225 U. S. 461, 32 Sup. Ct. 704, 56 L. Ed. 1205; *Lovell, Trustee v. Newman & Son*, 227 U. S. 412, 420, 33 Sup. Ct. 375, 57 L. Ed. 577. But such clearly was not the fact in this case.

[2] It is entirely clear that the essential and substantial issue in the case arose from the assertion by the appellee of the federal constitutional right to transport water, derived from an interstate stream, from Colorado into Nebraska under its priority of appropriation as of 1890, and the denial of this claim by the appellant state officers, based upon the contention that water in natural interstate streams in Colorado, having been declared by the Constitution and laws of that state to be the property of the public, dedicated to the use of the people of Colorado, the right could not be obtained by ap-

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propriation and beneficial use, to carry such water into an adjoining state for like use, as against persons desiring to use it in Colorado, even though junior in point of date of appropriation. Both lower courts denied this contention of the state officials, appellants, and enjoined them from treating the appellee in the distribution of water otherwise than as if the state line had not existed, and the land irrigated had been wholly within the state of Colorado. It is thus plain that the decree appealed from necessarily rested, not upon Colorado laws or decisions which attempted to deny the asserted right to the use of the water in Nebraska, nor upon Nebraska laws or decisions which could not be effective in Colorado, but upon rights secured to the appellee by the Constitution of the United States. This substantial and very fundamental question being in the case, and essential to the disposition which was made of it, the motion to dismiss must be overruled.

As to the merits of the case: In the discussion of the jurisdictional question it has been sufficiently developed that the essential controversy here involved is whether priority of appropriation of water, from the part of an interstate stream in Colorado, for beneficial use on lands in Nebraska, into which state the stream in a state of nature flows,

gives superiority of right over later appropriation also made in Colorado from the same stream, but for use in that state.

Both of the lower courts held that the presence of the state line did not affect the superiority of right and enjoined the Colorado state officials from treating the appellee in the distribution of water otherwise than it would be treated if the canal were wholly within the state of Colorado and all the lands irrigated therefrom were in that state.

The question thus presented is so fully disposed of on principle and authority in the opinion of the court this day announced in No. 3 original, *State of Wyoming v. State*

of Colorado et al., ^{*503} 259 U. S. 419, 42 Sup. Ct. 552, 66 L. Ed. —, that further discussion of it would be superfluous, and upon the authority of that decision the decree of the Circuit Court of Appeals is

Affirmed.

closed that he had actually been advised in these matters by witness, Edward Dunn, the Congregational Servant. Mr. Dunn was recognized by the Draft Board as an ordained minister and presiding clergyman of Jehovah's Witnesses in that area. Clearly, defendant's contention has no merit.

[4] Finally, defendant urges that the Court erred in not dismissing for cause a prospective juror (stricken by defendant), who admitted that he was prejudiced against Jehovah's Witnesses. This juror was one of four, from which group two alternates were to be chosen. The case was a short case and the likelihood of need of any alternates was slight. No alternate was needed. The original jury already picked decided the case. The contention is likewise without merit.



CITY OF ALTUS, OKLAHOMA, et al.

v.

Waggoner CARR.

Civ. A. No. 1530.

United States District Court

W. D. Texas,

Austin Division.

May 6, 1966.

Suit by Oklahoma municipality and others for declaration that a Texas statute violated the Federal Constitution. The three-judge District Court, Suttle, District Judge, held that Texas statute prohibiting, without legislative permission, the removal of water from underground source in Texas for use in another state constitutes an unconstitutional burden upon interstate commerce.

Relief prayed for granted and judgment accordingly.

1. Courts ⇨260.4

Generally federal courts will abstain from exercising jurisdiction in case where state statute is under attack as being violative of United States Constitution until such state statute has been first construed by courts of that state.

2. Courts ⇨260.4

The doctrine of abstention is not an absolute rule to be applied by federal courts to all cases involving constitutionality of a state statute which has not been construed by the state court.

3. Courts ⇨260.4

If a state statute is not fairly subject to an interpretation which will avoid or modify federal constitutional question, the federal court has a duty to decide the federal question when presented to it regardless of whether state court has construed the statute.

4. Waters and Water Courses ⇨131

Under Texas law, landowner has right to drill wells and appropriate water beneath his land.

5. Courts ⇨260.4

Texas statute forbidding, without legislative permission, the withdrawing of water from an underground source in state for use outside state was clear and unambiguous in meaning, and since under no reasonable construction could the constitutional issue be avoided federal court would not abstain from exercising jurisdiction in action to declare statute violative of Federal Constitution even though Texas court had not construed it. Vernon's Ann.Civ.St.Tex. art. 7477b, § 2.

6. Courts ⇨260.4

Where remedy of landowner under statute prohibiting the withdrawing of water, without legislative permission, from an underground source in Texas for use outside state was in the nature of a political or special legislative remedy rather than administrative or judicial remedy, landowners would not be required to exhaust such remedy before federal court would exercise jurisdiction in action to declare statute violative of Federal Constitution.

7. Courts ⇨262.4(2)

Individuals who, as officers of the state, are clothed with some duty in regard to enforcement of laws of state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an act violating Federal Constitution may be enjoined by federal court from such action. U.S.C.A.Const. Amend. 11.

8. Courts ⇨303(8)

The fact that a state officer by virtue of his office has some connection with enforcement of the allegedly unconstitutional act is the important and material fact in determining whether suit to declare act unconstitutional and naming officer is prohibited by the Eleventh Amendment to the Federal Constitution, and whether officer's connection arises out of general law, or is specially created by the act itself, is not material so long as it exists.

9. Courts ⇨303(8)

Texas Attorney General, who was by virtue of statute specifically granted authority to prosecute suits to enforce provisions of particular chapter of which allegedly unconstitutional statute was a part, had some connection with enforcement of statute so that federal court by taking jurisdiction of suit to declare act unconstitutional and naming him as a party was not violative of the Eleventh Amendment. U.S.C.A.Const. Amend. 11.

10. Declaratory Judgment ⇨123

There must be a realistic fear of prosecution or a realistic fear or apprehension that state statute in question will be enforced against plaintiffs if federal court action to declare state statute violative of Federal Constitution is not to be deemed premature.

11. Declaratory Judgment ⇨124

Oklahoma municipality and Texas landowner bringing suit for declaration of unconstitutionality of Texas statute prohibiting, without legislative permission, taking of water from underground source in Texas for use in another state had a realistic fear or apprehension that statute would be enforced against them

and their suit for declaration of unconstitutionality of statute was not premature. Vernon's Ann.Civ.St.Tex. art. 7477b, § 2; U.S.C.A.Const. Amend. 11.

12. Courts ⇨303(8)

It is not necessary that state officer, upon whom is duty of enforcing particular state statute attacked as violative of Federal Constitution, take some affirmative action to enforce statute so that suit against state officer in federal court to declare state statute unconstitutional be without the Eleventh Amendment, and if officer can, by declining to act, enforce statute there is threat enough to take suit without provisions of the Eleventh Amendment. U.S.C.A.Const. Amend. 11.

13. Courts ⇨303(8)

Where the very presence of Texas statute prohibiting the taking of water from underground source in Texas for use elsewhere and the possibility of its enforcement would preclude Oklahoma municipality from making further substantial expenditures of tax money necessary to obtain and transport water from Texas land, the presence of statute and the failure of Texas Attorney General to act constituted sufficient threat to take case against Attorney General in federal court to declare statute unconstitutional without contemplation of Eleventh Amendment. U.S.C.A.Const. Amend. 11.

14. Declaratory Judgment ⇨24

Purpose of Declaratory Judgment Act is to avoid accrual of unavoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to make suit, after damage had occurred. 28 U.S.C.A. § 2201.

15. Commerce ⇨5, 48

By virtue of Commerce Clause, Congress was specifically granted power to regulate commerce among the several states, and the states may not unreasonably burden or interfere with interstate commerce. U.S.C.A.Const. art. 1, § 8, cl. 3.

16. Commerce \hookrightarrow 48

State may, in absence of conflicting legislation by Congress, make laws governing matters of local concern which may in some measure affect interstate commerce, or even, to some extent, regulate it, but a state may not enact the law which imposes a direct burden on interstate commerce or discriminates against interstate commerce. U.S.C.A.Const. art. 1, § 8, cl. 3.

17. Commerce \hookrightarrow 48

The legislative declaration as to purpose and intent of statute prohibiting the removal of water from underground source in Texas for use outside of state to conserve and protect all water resources both public and private did not bind Texas landowner and Oklahoma municipality seeking declaration that statute was unconstitutional, and they could show that statute in its practical operation was an unreasonable burden on interstate commerce. U.S.C.A.Const. art. 1, § 8, cl. 3; Vernon's Ann.Civ.St.Tex. art. 7477b, § 2.

18. Commerce \hookrightarrow 55

Texas statute prohibiting, without legislative permission, the removal of water from underground source in Texas for use in another state constitutes an unconstitutional burden upon interstate commerce. U.S.C.A.Const. art. 1, § 8, cl. 3; Vernon's Ann.Civ.St.Tex. art. 7477b, § 2.

19. Waters and Water Courses \hookrightarrow 105

Under Texas law, if a landowner drilling well on his own land intercepts or drains off water from beneath his neighbor's land, this inconvenience to his neighbor falls within description of *damnum absque injuria* and cannot be ground of an action.

20. Waters and Water Courses \hookrightarrow 154(1)

The right to enter upon land and appropriate underground percolating waters is an interest in real estate which may be exercised by Texas landowner or

made the subject of an independent grant of ownership.

21. Waters and Water Courses \hookrightarrow 154(1)

After underground percolating water has been appropriated, landowner, his tenant or assign., has right to sell water to others for use off land and outside basin where produced, just as he could sell any other species of property. Vernon's Ann.Civ.St.Tex. arts. 7477b, § 7, 7880-3c, subd. D.

A. W. Walker, Jr., Ben B. West, Dallas, Tex., James W. Wilson, McGinnis, Lochridge, Kilgore, Hunter & Wilson, Austin, Tex., for plaintiffs.

Hawthorne Phillips, First Asst. Atty. Gen., J. Arthur Sandlin, Roger Tyler, Asst. Attys. Gen., of Texas, Austin, Tex., for defendant.

Before THORNBERRY, Circuit Judge, SPEARS, Chief Judge, District Court, and SUTTLE, District Judge.

SUTTLE, District Judge.

This is a suit for declaratory judgment decreeing that Section 2 of Article 7477b, Vernon's Ann.Tex.Civ.Stats.¹ is unconstitutional and void as being in violation of the Commerce Clause² of the United States Constitution, and for permanent injunction restraining the enforcement or execution thereof against these plaintiffs.

Section 2 of Article 7477b, Vernon's Ann.Tex.Civ.Stats. (Supp.1965) reads:

"No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it."

After a careful consideration of the record, briefs and arguments of counsel.

1. Sec. 2 of H.B. No. 225, Tex.Acts 1965, 59th Leg., ch. 568 at 1245, effective Aug. 30, 1965.

2. Article 1, Section 8, Clause 3, United States Constitution.

we are of the opinion the plaintiffs are entitled to the relief prayed for.

Summary of Stipulated Facts

The Plaintiff, City of Altus, Oklahoma, is a municipal corporation and county seat of Jackson County, Oklahoma, and Plaintiffs, C. F. Mock and Pauline Mock, are husband and wife and reside in the City of Altus, Oklahoma. The Defendant Waggoner Carr is the Attorney General of the State of Texas.

The Plaintiff, City of Altus, has an annual water allotment of 4,800 acre feet, set in 1941, from the W. C. Austin Project of the U. S. Bureau of Reclamation. In recent years, due to a rapid growth in population,³ there has been an increased demand upon the available water supply, which cannot be increased as all available water drawn from the Project over and above the allotment is committed to other users. In 1963, the City of Altus used its entire water allotment, and in 1964 was required to borrow some 700 acre feet of its 1965 allotment.

In December, 1963, foreseeing the problem of water shortage, the City of Altus retained an engineering firm to make recommendations as to potential sources of water that might be economically developed so as to meet its future requirements. In its March, 1964, Report on Water Supply,⁴ the engineering firm recommended that the City of Altus acquire from C. F. Mock and his wife, Pauline, the subsurface water rights in and to land owned by them in northern Wilbarger County, Texas, noting in such report that the Attorney General of the State of Texas in December, 1963, rendered an opinion that it would be legal for a Texas property owner to sell water from his land to an Oklahoma user.⁵

The Mocks' land, approximately 5,663 contiguous acres, lying in northern Wilbarger County, Texas, borders the Red River, the boundary line between Wilbarger County, Texas, and Jackson County, Oklahoma, and is some fourteen miles from the City of Altus, Oklahoma. Approximately six square miles of the Mocks' land is located in the extreme northern portion of an area covering approximately 75 square miles known as the Odell Sand Hills, under which there is a natural subsurface water-bearing formation which contains a high quality percolating ground water suitable for municipal use. The City of Vernon, Texas, some 14 miles south of the Mocks' land, has several wells drawing from this formation, the northern-most well being some four miles south of the southern boundary of the Mock property. With the exception of the Odell Sand Hills, there is no economically available ground water within a 50-mile radius of either the City of Altus or the City of Vernon which is of such quality and quantity.

With the permission of the Mocks, and at the request of the City of Altus, a water-well drilling and engineering firm drilled and logged a series of 26 test holes on the Mock land during the month of July, 1964, for the purpose of testing the quantity and quality of the subsurface water and determining the cost of its production. In its report of September, 1964,⁶ the drilling and engineering firm recommended that the City of Altus develop two well fields by drilling 13 wells at suggested sites which would have an estimated yearly yield of approximately 2100 acre feet. This combined with the annual allotment from the W. C. Austin Project is estimated to be sufficient to serve the needs of the City of Altus

3. The population of the City of Altus has increased from 9,735 in 1959 to an estimated 23,500 at the present. Excluding Altus Air Force Base, which from 1960 through 1963 had a constant resident population of 5,598 persons, the City of Altus has had an average annual increase in population of 589 persons from 1950 to 1960. Report on Water Sup-

ply, March 1964, pgs. 5-8. Plaintiffs' Exhibit No. 2.

4. Report on Water Supply, supra note 3.

5. Attorney General's Opinion C-199, Dec. 20, 1963.

6. Ground Water Survey for City of Altus, Oklahoma, September 1964, Plaintiffs' Exhibit No. 3.

ural gas is exported for consumption in other states. Besides, what may be done with one natural product may be done with others, and there are several states in which the earth yields products of great value which are carried into other states and there used. But, notwithstanding the importance of the question, its solution is not difficult. The controlling principles have been settled by many adjudications—some so closely in point that the discussion here may be relatively brief.

"By the Constitution (article I, § 8, cl. 3) the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it. Even their power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against such commerce. (citations omitted)

"Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference." 262 U.S. at 596, 43 S.Ct. at 665 (citations omitted)

In *West v. Kansas Natural Gas Co.*, the Supreme Court had before it an Oklahoma statute which denied the right of eminent domain and the right to use the highways of the state for the purpose of transporting natural gas without the state. The effect of the statute was to

deny owners of the natural gas the right to transport it out of the state. The Supreme Court, in holding the statute invalid under the Commerce Clause, stated:

"We place our decision on the character and purpose of the Oklahoma statute. * * * It denies to appellees the lesser right to pass under * * * or over [the highways] * *. This discrimination is beyond the power of the state to make. As said by the circuit court of appeals in the eighth circuit, no state can by action or inaction prevent, unreasonably burden, discriminate against or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends." 221 U.S. at 262, 31 S.Ct. at 574.

The Defendant, however, contends that Section 2 of Article 7477b is not a burden on or interference with interstate commerce for two reasons. First, as evidenced by Section 1 of Article 7477b, the purpose and intent of Section 2 is to conserve and protect the water resources of the State by regulating the withdrawal of water from underground sources, and, second, since the statute here in question operates on and regulates underground water, which is not the subject of absolute ownership, it does not affect a substance which is a subject of commerce. In support of his second contention, the Defendant asserts the cases of *Commonwealth of Pennsylvania v. State of West Virginia* and *West v. Kansas Natural Gas Co.*, relied upon by the Plaintiffs, are distinguishable from this case, and that the cases of *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962) appeal dismissed, 375 U.S. 7, 84 S.Ct. 46, 11 L.Ed.2d 38, reh. den. 375 U.S. 936, 84 S.Ct. 328, 11 L.Ed.2d 267, and *Knight v. Grimes*, 80 S.D. 517, 127 N.W.2d 708 (1964), are controlling.

In regard to the Defendant's first contention, we observe the assertion therein is not a novel one. This contention was considered in both *Commonwealth of Pennsylvania v. State of West Virginia* and *West v. Kansas Natural Gas Co.* In

the West case, the State of Oklahoma asserted that it had the right to conserve, or rather the right to reserve, the resources of the state for the use of its inhabitants. In answer thereto, the Supreme Court stated:

"The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of these products might be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle?" 221 U.S. at 255, 31 S.Ct. at 571.

In *Commonwealth of Pennsylvania v. State of West Virginia*, the Supreme Court again expressed disapproval of this contention, stating:

"Another consideration advanced to the same end is that natural gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state. If the situation be as stated, it affords no ground for the assumption by the state of the power to regulate interstate commerce, which is what the act

attempts to do. That power is lodged elsewhere." 262 U.S. at 598, 43 S.Ct. at 665.

[17] Also, the fact that Section 1 of Article 7477b declares that the purpose and intent of such Article is "to conserve and protect all water resources both public and private" does not bind the Plaintiffs, and they may show that the statute in its practical operation is an unreasonable burden on interstate commerce. *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10, 49 S.Ct. 1, 73 L.Ed. 147 (1928).

The Defendant seeks to support his position that Section 2 of Article 7477b is a valid and reasonable exercise of the police power on the theory that Section 2 acts only upon uncaptured water, which has no owner, or, if there is an owner, it is the common property of the State of Texas. To support this theory and his general position that under any view the statute is a reasonable exercise of the police power, the Defendant relies primarily upon *Greer v. State of Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1896); *Hudson County Water Company v. McCarter*, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908); *Knight v. Grimes*, *supra*, and *Williams v. City of Wichita*, *supra*.

[18] In our opinion, none of the above cases presents sufficient authority for this court to disregard the holdings of the cases of *Commonwealth of Pennsylvania v. State of West Virginia*, and *West v. Kansas Natural Gas Co.*, which are found to be controlling on the issue presented herein. Considering the statute in question only with regard to whether it regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce. Moreover, on the facts of this case it appears to us that Section 2 of Article 7477b does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of

her sister States as in the case of *West v. Kansas Natural Gas Co.* In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant; for example, from Wilbarger County to El Paso County, Texas. Obviously, the statute had little relation to the cause of conservation.

[19-21] Under the law of the State of Texas, a landowner has the right to drill wells and appropriate all the underground percolating waters found to his own purposes, and if, in the exercise of such right, he intercepts or drains off water from beneath his neighbor's land, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot be the ground of an action. *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d 798 (1955), *Houston & T. C. Ry. Co. v. East*, 98 Tex. 146, 81 S.W. 279 (1904). This right to enter upon the land and appropriate underground percolating waters is an interest in real estate, and may be exercised by the landowner or made the subject of an independent grant of ownership. *Evans v. Ropte*, 128 Tex. 75, 96 S.W.2d 973 (1936). Further, after the water has been appropriated, the landowner, his lessee or assign, has the right to sell the water to others for use off of the land and outside the basin where produced, just as he could sell any other species of property. *City of Corpus Christi v. City of Pleasanton*, 154 Tex. 289, 276 S.W.2d at 802 (1955); *Pecos County Water Control & Improvement Dist. No. 1 v. Williams*, 271 S.W.2d 503, 505 (Tex.Civ.App.1954, *err. ref. n. r. e.*); *Texas Co. v. Burkett*, 117 Tex. 16,

296 S.W. 273, 278, 54 A.L.R. 1397 (1927). These rights, although not codified, have been generally recognized by statute as property rights of sufficient character for ownership. Art. 7880-3c, subsection D, *Vernon's Ann.Tex.Civ.Stats.* and Art. 7477b, Section 7, *Vernon's Ann.Tex.Civ. Stats.*¹⁵ Thus, except for Section 2 of Article 7477b, the general law of the State of Texas, which recognizes water that has been withdrawn from underground sources as personal property subject to sale and commerce, would allow the Plaintiffs to withdraw water from the Mock's land and transport same to the City of Altus.

This statute, however, seeks to prohibit the production of underground water for the purpose of transporting same in interstate commerce, and has the effect of prohibiting the interstate transportation of such water after it has become personal property. Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the *Pennsylvania* and *West* cases, or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce. Clearly, then, Section 2 of this statute constitutes an unreasonable burden upon interstate commerce. Plaintiffs should not be denied by the provisions of such statute the right to withdraw and move water in interstate commerce.

The relief prayed for by the Plaintiffs is in all things granted, and judgment will be entered accordingly.

15. Article 7880-3c, subsection D, provides: "The ownership and rights of the owner of the land, his lessees and assigns, in underground water are hereby recognized, and nothing in this Section 3c shall be construed as depriving or divesting such

owner, his assigns or lessees, of such ownership or rights, subject, however to the rules and regulations promulgated pursuant to this Section 3c." The above is incorporated almost verbatim in Section 7 of Article 7477b.

APPENDIX E

REPUBLICAN RIVER COMPACT C.R.S. 1973, 37-67-101

Article V

The judgment and all provisions thereof in the case of Adelbert A. Weiland, as state engineer of Colorado, et al. v. The Pioneer Irrigation Company, decided June 5, 1922, and reported in 259 U. S. 498, affecting the Pioneer irrigation ditch or canal, are hereby recognized as binding upon the states; and Colorado, through its duly authorized officials, shall have the perpetual and exclusive right to control and regulate diversions of water at all times by said canal in conformity with said judgment.

The water heretofore adjudicated to said Pioneer Canal by the district court of Colorado, in the amount of fifty (50) cubic feet per second of time is included in and is a part of the total amounts of water hereinbefore allocated for beneficial consumptive use in Colorado and Nebraska.